20150184
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOVEMBER 20, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Matter of the Guardianship and Conservatorship of R.G., an Incapacitated Person.

C.G. Petitioner and Appellee
v.
K.P.; S.P.; R.G.; K.N., co-guardian; S.S. co-guardian; Audrey Ulrich, co-guardian, GAPS; American State Bank and Trust, conservator; Jeff Nehring, Guardian ad litem; and Christopher Carlson, Guardian ad litem, Respondents

---

K.P., Appellant

An Appeal from Order Appointing Guardian and Conservator

McKenzie County No. 27-2014-PR-00373

Supreme Court No. 20150184

Submitted by Larson Latham Huettl LLP,
William C. Black (#07284),
521 East Main Avenue, Suite 450,
Bismarck, ND 58501
(701) 223-5300
Attorneys for K.P, Appellant

BRIEF OF APPELLANT, K.P.

APPEAL TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA FROM THE ORDER APPOINTING GUARDIAN AND CONSERVATOR ENTERED BY THE HONORABLE ROBIN A. SCHMIDT DATED AND FILED ON APRIL 20, 2015 IN THE DISTRICT COURT OF MCKENZIE COUNTY IN THE NORTHWEST JUDICIAL DISTRICT.

William C. Black
Larson Latham Huettl LLP
PO Box 2056, Suite 450
Bismarck, ND 58502-2056
Phone No: (701) 223-5300
BAR ID No: 07284
Attorney for Appellant

TABLE OF CONTENTS

Page No.

Table of Authorities 1

Paragraph No.

Issue Presented.....1

Statement of the Case.....3

Statement of the Facts 6

Law and Argument …… 19

I. The District Court Erred as a Matter of Law by Not Making Adequate Findings of Fact and Conclusions of Law Pertaining to Undue Influence and Capacity……. 19

A. Undue Influence ……. 24

B. Capacity ……..32

III. The District Court Abused its Discretion in Appointing Persons of a Lower Priority Over K.P. Because Evidence Did Not Support Findings of Either Good Cause or Lack of Qualification …..……...44

A. Good Cause ……44

B. Lack of Qualification ……61

Conclusion 68

Certificate of Compliance.....69

TABLE OF AUTHORITIES

Paragraph No.

Cases

Abelmann v. Smartlease USA, L.L.C.
2014 ND 227, 856 N.W.2d 747 19

Black v. Smith
58 N.D. 109, 224 N.W. 915 34

City of Bismarck v. Mariner Constr. Inc.,
2006 N.D. 108, 714 N.W.2d 484 44

Doheny v. Lacy
168 N.Y. 213, 61 N.E. 255 (Ct. App. N.Y. 1901) 26

Edwardson V. Gerwein
41 N.D. 506, 171 N.W. 101 34

In re E.G.
2006 N.D. 126, 716 N.W.2d 469 20

In re Estate of Wagner
367 N.W.2d 736 (Neb. 1985) 25

In re Guardianship of B.K.J.
2015 N.D. 191, 867 N.W.2d 345 ..... 55, 57

In re Guardianship & Conservatorship of Thomas
2006 N.D. 219, 723 N.W.2d 384 ..... 20, 44, 50, 51, 64, 65, 66

In re Johnson
2015 N.D. 71, 861 N.W.2d 484 19

Ireland v. Charlesworth
98 N.W.2d 224 (N.D. 1959) 26

Johnson v. Johnson
85 N.W.2d 211 (N.D. 1957) 24

Malik v. Tommy's Auto Serv., Inc.
24 A.3d 114 (Md.Ct.Spec.App. 2011) 53

Matter of Estate of Herr
460 N.W.2d 699 (N.D. 1990) 24

Matter of Estate of Mickelson
477 N.W.2d 247 (N.D. 1991) 34
Matter of Estate of Polda
349 N.W.2d 11 (N.D. 1984) 24

Matter of Estate of Wagner
265 N.W.2d 459 (N.D. 1978) 24, 26

Matter of R.A.S.
2008 N.D. 185, 756 N.W.2d 771 19

Savre v. Santoyo
2015 N.D. 170, 865 N.W.2d 419 19

Sorenson v. Slater
2010 N.D. 146, 786 N.W.2d 739 19

Storman v. Weiss
65 N.W.2d 475 (N.D. 1954) 34, 35

Statutes

N.D.C.C. § 30.1-28-11(1) 55, 61, 63

N.D.C.C. § 30.1-28-11(2) 2, 45, 48, 56, 57, 59

N.D.C.C. § 30.1-28-11(3) 56

Other Authorities

N.D.R.Civ.P. 52(a)..... 19

Black's Law Dictionary (10th ed. 2014)..... 44

Issues Presented

[1] Whether a district court errs when it fails to make findings of fact or conclusions of law to support appointing a guardian and/or conservator with lower priority than a guardian and/or conservator nominated in an incapacitated person's General Durable Power of Attorney.

[2] In the context of N.D.C.C. 30.1-28-11(2), what constitutes "good cause" and "lack of qualification?"

Statement of the Case

[3] This case was initiated against R.G. by an Ex Parte Petition for Appointment of an Emergency Guardian and Conservator dated September 24, 2014, after a raid took place on R.G.'s property. (App. Pg. 8). The petitioner alleged elder abuse and financial exploitation were being perpetrated by S.P., R.G.'s niece and appointed power of attorney. (App. Pg. 9) A temporary guardianship and conservatorship was put in place. (App. Pg. 12).

[4] Thereafter, a hearing for the appointment of a permanent guardian(s) and conservator were held on January 30, 2015. S.P. waived her right to act as R.G.'s power of attorney under R.G.'s Durable Power of Attorney/Appointment of Health Care Agent. Tr. 29:4-6. This made K.P., R.G.s nephew and S.P.'s sister, R.G.'s power of attorney. K.P. sought appointment as permanent guardian and conservator.

[5] K.P.'s appointment as R.G.'s guardian and conservator was opposed by other relatives of R.G.'s. Alluding to a potential conflict of interest, the district judge found that good cause existed to pass over K.P. as R.G.'s guardian and conservator and to appoint persons with lower priority as co-guardians and conservator. Tr. 52:21 – 53:22. The

district court issued its Order Appointing Guardian and Conservator on April 20, 2015. (App. Pg. 18). K.P. takes an appeal to this Honorable Court.

Statement of Facts

[6] The ward in this case is R.G., an 87 year old man. (App. Pg. 8). During warmer months, R.G. lived in one of several trailer houses located on land in rural McKenzie County, North Dakota, that was owned by R.G. and members of his deceased brother's family. Emer. Tr. 12:14-18. In the winter months R.G. traveled to, and lived in, Wellton, Arizona. Emer. Tr. 12:19-23. He had done this every winter for 40-50 years. Emer. Tr. 23:18-20.

[7] Prior to May of 2014, R.G.'s brother had been helping to care for R.G. Tr. 5:5-6 In May of 2014 R.G.'s brother passed away. *Id.* After his passing, S.P., a niece of R.G.'s with whom he had a longstanding relationship, began to assist R.G. with certain tasks and affairs. However, as S.P. lived outside of Billings, Montana she usually only saw R.G. once or twice per month. Emer. Tr. 5:25 – 6:1. S.P. would drive R.G. to Arizona during the winter months. Emer. Tr. 22:25 – 23:5.

[8] On September 8, 2014, McKenzie County Sheriff's Deputies, along with agents from the FBI and DEA, raided the property on which R.G.'s trailer house was located. (App. Pg. 9). On September 26, 2014, after learning of the raid, C.G. submitted her Ex Parte Petition for Appointment of an Emergency Guardian and Conservator (the "Emergency Petition") to the District Court, McKenzie County, State of North Dakota. (App. Pg. 8). The Emergency Petition sought to have K.N. and Guardian and Protective Services, Inc. ("GAPS") in Bismarck, North Dakota appointed as temporary co-guardians

and nominated GAPS to serve as conservator. (App. Pg. 10). The Emergency Petition also sought to have attorney Jeff Nehring appointed as guardian ad litem. (App. Pg. 10)

[9] Among other things, C.G.'s petition stated concerns that R.G.'s living conditions were unsuitable because the trailer used space heaters in lieu of a furnace, received its water from hoses connected to another trailer located on the property, and did not have sewer connected to the trailer at the time of the raid. (App. Pg. 8). R.G. stated that the trailer stayed 70-75 degrees at night in the summer with space heaters. Emer. Tr. 18:14-18. He also stated he did not hook up the running water and sewer because he would have to "blow all [the] lines out before going" to Arizona in the winter. Emer. Tr. 13:18-20; 28:20-24.

[10] The Emergency Petition also stated fears that S.P. had been committing elder abuse, financially exploiting, and exercising undue influence over R.G. (App. Pg. 9). At the time of the Emergency Petition, R.G. handled his own finances, but was unable to drive and relied on others for rides and several other basic needs. Emer. Tr. 28:5-6.

[11] Beginning in May of 2013, R.G. executed a series of documents transferring land and mineral interests to S.P. (App. Pg. 21-23). On July 2, 2014 R.G. executed a Durable Power of Attorney/Appointment of Health Care Agent (hereinafter "DPOA") that named S.P. as his attorney in fact. Emer. Tr. 20:18-19. (App. Pg. 25). On that day he also executed his Last Will and Testament. (App. Pg. 30). These documents were prepared by Attorney Ryan Geltel of MacMaster, Getltel & Siewert, LTD. Emer. Tr. 31:3-9. The DPOA nominated K.P., who is R.G.'s nephew, as the alternate attorney-in-fact and health care agent if S.P. was unable or unwilling to serve as the same. (App. Pg. 28).

[12] On September 29, 2014, an Emergency Conservator and Guardianship hearing (the "Emergency Hearing") took place with the Honorable Robin J. Schmidt presiding. At this hearing testimony was taken from the guardian ad litem; C.G., and R.G. The guardian ad litem testified that he believed S.P. was unduly influencing R.G., but stated that he had never met or spoken to S.P. Emer. Tr. 7:16-17. The guardian ad litem also testified that he believed a guardianship and conservatorship were in R.G.'s best interests. Emer. Tr. 6:14-16.

[13] R.G. opposed the Emergency Petition and testified that he had transferred the property to S.P. because he believed there were tax advantages and also because he didn't want other family members to have the property. Emer. Tr. 13:1-17. R.G. also testified that he had appointed S.P. as his attorney-in-fact to "help [him] along." Emer. Tr. 15:18-20.

[14] Attorney Geltel represented R.G. at the Emergency Hearing and sought to have the DPOA admitted into evidence. Emer. Tr. 15:25 – 16:2. Attorney Taylor Olson, representing the petitioner, did not object to the admission of the document and the district judge allowed the DPOA into evidence. Emer. Tr. 16:3-8.

[15] At the conclusion of the Emergency Hearing, an emergency guardianship and conservatorship was ordered for R.G., although the trial judge noted that "this is probably the slimmest amount of evidence that I have found to find a conservatorship and guardianship." Emer. Tr. 37: 3-5.

[16] On January 30, 2015 a hearing was held to determine if a permanent guardianship and conservatorship was necessary for R.G. (the "Guardianship Hearing"). At the time the Guardianship Hearing took place, R.G. no longer opposed the imposition of a

guardianship and conservatorship. Tr. 2:25 – 3:2. At the close of the Guardianship Hearing, the court ordered that GAPS, S.S. and K.N. be appointed co-guardians and that American State Bank be appointed as conservator; contrary to the recommendation of K.P., R.G.'s attorney in fact, and the terms of R.G.'s DPOA. Tr. 52:21 – 53:4.

[17] The trial judge stated that she had concerns about R.G.'s ability to execute the DPOA without undue influence, and that good cause dictated that K.P. not be named as guardian and conservator. *Id*. The DPOA was not admitted into evidence during the Guardianship Hearing and the trial judge stated that she had not seen the DPOA. *Id*.

[18] No testimony or evidence was given regarding the factors of undue influence, conflict of interest, capacity, or good cause during the Guardianship hearing.

Law and Argument

I. The District Court Erred as a Matter of Law by Not Making Adequate Findings of Fact and Conclusions of Law Pertaining to Undue Influence and Capacity.

[19] "Rule 52(a)(1), N.D.R.Civ.P., specifically requires that in an action tried on the facts without a jury, 'the court must find the facts specifically and state its conclusions of law separately.'" *Savre v. Santoyo*, 2015 ND 170, ¶ 27 (*citing Sorenson v. Slater*, 2010 ND 146, ¶ 10). This Court has previously held that "conclusory, general findings do not satisfy the requirements of N.D.R.Civ.P. 52(a), and a district court errs as a matter of law when it does not make required findings [for the appellate court] to adequately understand the basis of its decision." *Savre*, at ¶ 27 (*citing Abelmann v. Smartlease USA, L.L.C.*, 2014 ND 227, ¶ 18). "The court must specifically state the facts upon which its ultimate conclusion is based on." *In re Johnson*, 2015 ND 71, ¶ 8 (*citing Matter of R.A.S.*,

2008 ND 185, ¶ 8). "The court errs as a matter of law when it does not make the required findings. *Id.*

[20] The Court reviews a district court's findings of fact for clear error. *In re Guardianship & Conservatorship of Thomas*, 2006 ND 219, ¶ 7, 723 N.W.2d 384. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support the finding, or if, on the entire record, we are left with a definite and firm conviction a mistake has been made." *In re E.G.*, 2006 ND 126, ¶ 7, 716 N.W.2d 469.

[21] In the instant case, the district court failed to make any specific findings of fact and did not state its conclusions of law. In finding that good cause existed to appoint co-guardians and a conservator who were all of lower priority to serve, the district judge stated "I do have great concerns about [R.G.'s] ability to make that decision back in July without undue influence…. I'm going to find good cause dictates the contrary to following that document, which I haven't seen either." Tr. 52:21 – 53:1.

[22] The district court's Order Appointing Guardian and Conservator of April 20, 2015 failed to shed any further light on the district judge's reasoning behind her decision to pass over K.P. as R.G.'s guardian and conservator. The district court's Order made no mention of good cause, undue influence, lack of qualification or lack of capacity; nor did it mention any evidence upon which the court relied in making its decision. Between the Guardianship Hearing and the court's Order, the only "finding of fact" relating to good cause was the trial judge's conclusory statement at the Guardianship Hearing that she was "going to find good cause dictates the contrary to following that document…." *Id.*

[23] Besides not making specific findings of fact, the district judge's statement that she had not seen R.G.'s DPOA is demonstrably false and erroneous. In the Emergency Hearing, Attorney Ryan Geltel, submitted R.G.'s DPOA to the court, and the court received it into evidence. Emer. Tr: 15:25 – 16:11. For unknown reasons, the document did not become part of the record of this case until nearly nine months later, when it was introduced as Exhibit 11 at a hearing that took place from September 10-14, 2015. The district judge based her April 20, 2015 Order on an erroneous view of the evidence presented to the court. The district judge committed reversible error by failing to recognize the existence of the DPOA or to take evidence regarding the DPOA. The district court's error deprived R.G. of his chosen representative.

A. <u>Undue Influence</u>

[24] Undue influence is defined as "improper influence exercised over [a person] … in such a way and to such an extent as to destroy his free agency or his voluntary action by substituting for his will the will of another." *Johnson v. Johnson*, 85 N.W.2d 211, 221 (N.D. 1957). **Undue influence must be sufficiently proven, a mere suspicion is not enough**." *Id*. (citing *Matter of Estate of Herr,* 460 N.W.2d 699, 702 (N.D.1990); *Matter of Estate of Polda,* 349 N.W.2d 11, 14 (N.D.1984); *Matter of Estate of Wagner*, 265 N.W.2d 459, 465 (N.D.1978))(Emphasis added).

[25] To prove that the proposed ward is a victim of undue influence, it must be shown 1) that the person was susceptible to such influence; 2) that the opportunity to exercise such influence existed; 3) that the influence was used for an improper purpose; and 4) that the result was clearly the effect of such undue influence. A showing of mere influence is not enough. *In re Estate of Wagner*, 367 N.W.2d 736 (Neb. 1985).

[26] This Court has stated that "not every confidential relationship … gives rise to a presumption of undue influence …. [t]he law will not presume [undue influence] from the ordinary relations between persons in the … family connection. The question as to parties so situated is a question of fact dependent upon the circumstances in each case." *Ireland v. Charlesworth*, 98 N.W.2d 224, 236 (N.D. 1959) (*citing Doheny v. Lacy*, 168 N.Y. 213, 61 N.E. 255, 258 (Ct.App.N.Y. 1901)). North Dakota has not created a statutory presumption of undue influence, and even if it had, any party wishing to rely on that presumption would first have to "introduce credible evidence to establish the presumption before it will be effective." *Matter of Wagner's Estate*, 265 N.W.2d 459, 462-63 (N.D. 1978).

[27] The petitioner and her attorney alleged that R.G. was unduly influenced by S.P. in executing the DPOA. However, undue influence was never proven. The aforementioned factors were never presented to the trial court and no evidence was taken as to whether R.G. had been unduly influenced. In fact, the evidence and testimony presented at the Emergency Hearing and the Guardianship Hearing did not come close to satisfying a showing of undue influence in the execution of the DPOA.

[28] With regard to the first element of undue influence, R.G. was never shown to be susceptible to undue influence. In fact, his testimony throughout the hearings showed reasonable and logical motives for disposing of his property and executing his Last Will and Testament and the DPOA. He was aware of his property and of what he was doing with the same.

[29] It was not shown that S.P. had the opportunity to unduly influence R.G. However, it was shown that she lived outside of Billings, MT and only visited once or twice per

month. Emer. Tr. 5:25 – 6:1. It was also shown that R.G. relied on other persons for his basic needs, and that S.P. was not his sole care provider. These factors weigh against an opportunity for undue influence.

[30] R.G. stated several times that he wanted to convey the property to S.P. He stated that a portion of the proceeds from the property was used to help provide for his sister's care. He stated that he believed it could provide tax advantages (even if R.G. was wrong in that belief, it does not mean it was an improper conveyance). He also stated that he wanted S.P. to deal with the other family members trying to obtain the property. None of these reasons would show an improper purpose for the conveyance of the land and minerals.

[31] It is not possible to determine that the transfers of property and the execution of the Last Will and Testament and DPOA were clearly the effect of undue influence upon R.G. Based on the information, testimony and evidence presented to the district court, any finding of undue influence is clearly erroneous. Yet, this is what the court appears to have, in part, based its Order on. Based on the foregoing, the district court committed reversible error by not making appropriate findings of fact and conclusions of law to hold that R.G.'s DPOA was the product of undue influence.

B. <u>Capacity</u>

[32] In passing over the K.P. for appointment as R.G.'s guardian and conservator, the district court questioned R.G.'s capacity to execute his DPOA. However, the district court failed to take any evidence regarding R.G's capacity at the time he executed his DPOA.

[33] At the Emergency Hearing, the trial judge stated that "this is probably the slimmest amount of evidence that I have found to find a conservatorship and guardianship." Emer. Tr. 37:3-5. During the later Guardianship Hearing, the district judge stated that she had concerns about R.G.'s ability to execute the DPOA without undue influence. Tr 52:21-22. Additionally, Attorney Taylor Olson, the attorney for the Petitioner stated that "[i]f [R.G.] signed a power of attorney in July of 2014, and we began this proceeding a mere six weeks later, I think it was likely at that time that when he signed that document that he probably was incapacitated as well." Tr. 50:10-14. The Guardianship Proceedings were initiated on September 28, 2015; nearly three full months after the DPOA was executed by R.G. There was no testimony taken regarding R.G.'s capacity at the time he executed the DPOA. Attorney Olson's conjecture was not evidence, nor was she qualified to make such a determination.

[34] In the context of wills, "it is settled law in this state that where a will is contested on the ground that the testator did not have sufficient mental capacity to make a will the contestant has the burden of establishing by competent evidence that at the time the will was made the testator did not have testamentary capacity. *See, Storman v. Weiss*, 65 N.W.2d 475, 500 (N.D. 1954)(*citing Black v. Smith*, 58 N.D. 109, 224 N.W. 915; *Edwardson v. Gerwien*, 41 N.D. 506, 171 N.W. 101. Furthermore, a party contesting a will on the grounds of undue influence bears the burden to sustain the challenge. *See Storman*, at 520. "A determination of testamentary capacity, or the lack of it, is a question of fact." *Matter of Estate of Mickelson*, 477 N.W.2d 247, 251 (N.D. 1991).

[35] To explain testamentary capacity, this Court has stated that:

> "Testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting,

> the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the objects of his bounty, and his relation towards them. He must have sufficient mind and memory to understand all of these facts; …. He must also be able to appreciate the relations of these factors to one another, and to recollect the decision which he has formed."

See Stormon v. Weiss, 65 N.W.2d 475, 504-05 (N.D. 1954).

[36] While there are no similar provisions of North Dakota law governing the contestation of a durable general power of attorney, the testamentary capacity principles are instructive; especially since R.G. executed his Last Will and Testament at the same time as his DPOA. In the instant case, the presumption of testamentary capacity was not overcome by competent evidence at the Guardianship Hearing.

[37] During both the Emergency Hearing and the Guardianship Hearing, R.G. displayed sufficient strength and clearness of mind and memory to know the nature and extent of the property which he had previously disposed of. He also knew the nature and extent of the powers granted to S.P. under the DPOA.

[38] When asked if he had wanted to transfer property to the individual who he transferred the property to, R.G. responded "Yes. I'd rather transfer to her where she can get use out of it, than other people." Emer. TR: 13: 4-5. Regarding transfers of his property, R.G. further testified that "they started proceedings against me over there. I said, 'I want to transfer this to you [S.P.]. I'd rather have you fight it, then to have them come after me…." and that "part of this deal that I transferred to S.P., it pays for [Evelyn's] deal in the [nursing] home." Emer. Tr: 20: 22-25; 21: 24-25. R.G. understood what he was transferring and the extent of the transactions.

[39] During both hearings, R.G. displayed the ability to know, without prompting, who the objects of his bounty were, and his relation to them. On direct examination during the Emergency Hearing, the following exchange took place between R.G. and his attorney, Ryan Geltel:

> Q. And then some references have been made to an individual named [S.P.] I would like to enter into evidence –
>
> A. Okay. [S.P.] is a cousin to [L.], and my – another one of my nieces.
>
> Q. Okay. So, she – [S.P.] is a niece of yours?
>
> A. Yes.
>
> Q. A family member?
>
> A. Yeah, and so is [L.] over there.
>
> Q. Recently, did you give [S.P.] a Power of Attorney to help you with affairs if you need it?
>
> A. Yeah, to help me along, yes.

Emer. Tr: 15:9-20.

[40] The district judge went on to have the following exchange with R.G.:

> Q. You said that [S.P.] is your niece, correct?
>
> A. Yes.
>
> Q. Can you tell me who's [sic] child she is? Is it your sister's, or your brother's?
>
> A. She's my sister [E.] – is her mother. My sister.

Q. Okay. [E.] is her mother?

A. Her mother, yeah.

Emer. Tr: 18:21 – 19:4.

[41] R.G. was also able to identify other members of his family in the court room. See Emer. Tr: 19:5-18. This again displayed knowledge of the objects of his bounty; as well as strength and clearness of mind. R.G. knew he was giving a power of attorney to S.P. and understood the ramifications of doing so.

[42] Attorney Geltel drafted the DPOA. Emer. Tr: 31:3-24. In his closing statements at the Emergency Hearing, Attorney Geltel spoke of R.G.'s capacity to understand his property and finances, as well as R.G.'s capacity to understand the objects of his bounty and to convey his property for reasons he found wholly appropriate. Emer. Tr. 34:13 – 35:5. It stands to reason that Attorney Geltel also believed his client possessed the appropriate capacity to execute the DPOA.

[43] In basing her Order, in part, on questions of R.G.'s capacity to execute his DPOA, but failing to take evidence pertaining to R.G.'s lack of mental capacity at the time the document was executed, the district court committed reversible error.

II. The District Court Abused its Discretion in Appointing Persons of a Lower Priority over K.P. Because Evidence Did Not Support Findings of Either Good Cause or Lack of Qualification.

A. Good Cause

[44] The Court reviews the district court's selection of a guardian under an abuse of discretion standard. *Thomas*, 2006 ND 219, ¶ 7, 723 N.W.2d 384. "A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned determination, or it

misinterprets or misapplies the law." *City of Bismarck v. Mariner Constr., Inc.*, 2006 ND 108, ¶ 8, 714 N.W.2d 484. Good cause is defined as "a legally sufficient reason." *See* CAUSE, Black's Law Dictionary (10th ed. 2014). What constitutes "good cause" and/or "legally sufficient" has not yet been defined under North Dakota law.

[45] N.D.C.C. 30.1-28-11(2) states "[u]nless lack of qualification or other good cause dictates the contrary, the court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney."

[46] The district court abused its discretion in appointing GAPS, S.S. and K.N. as co-guardians and American State Bank as conservator over K.P. The district court's finding of "good cause" was conclusory, not supported by the evidence, and was legally insufficient.

[47] S.P. was nominated as R.G.'s attorney-in-fact in the July 2nd, 2014 DPOA. However, she agreed to waive her right to appointment. This meant that K.P. had priority to be appointed as R.G.'s attorney in fact because the DPOA named him as the alternate attorney-in-fact if S.P. was unable or unwilling to serve in that capacity. Under the DPOA, R.G.'s attorney-in-fact was authorized to nominate a person (including R.G.'s attorney-in-fact) or entity to be appointed as guardian and/or conservator. (App. Pg. 28).

[48] During the Guardianship Hearing K.P. requested that he be appointed R.G.'s guardian and conservator. Pursuant to N.D.C.C. 30.1-28-11(2), K.P. had priority to be appointed as guardian and conservator because, as R.G.'s attorney in fact under the DPOA, he could and did nominate himself as guardian and conservator. Once it has been established that K.P. had priority under R.G.'s DPOA, the burden shifted to the petitioner to show good cause or lack of qualification that would be sufficient to pass over the

nominated person in the DPOA for someone with a lower priority. This burden was not met.

[49] The district judge alluded to a potential conflict when she stated "with the level of contention that's going on with this family, I don't think that anybody should be involved with [R.G.'s] finances. And I think it'll put you in a terribly awkward situation, K.P." Tr. 53: 5-8. The guardian ad litem testified that he "found it interesting that when [he] was listening to [K.P.'s] testimony, that him and [S.P.] worked together on the [M]edicare issue. But what [the guardian ad litem] didn't hear was that [S.P.] had rescinded, or deeded back the minerals and the real-estate back to [R.G.]." Tr. 47: 16-20.

[50] In the case of *In re Guardianship and Conservatorship of Thomas* the district court found good cause to pass over the guardian nominated in the incapacitated person's durable power of attorney. 2006 ND 19 at ¶ 8. In *Thomas,* the proposed guardian (Kolrud) was a friend of the incapacitated person (Lucille Thomas) and had conducted numerous financial transactions on her behalf. Kolrud had been paid commissions on several of the financial transactions. Over time, he became Lucille Thomas' caregiver, and was later designated as her attorney-in-fact and became a beneficiary under her will.

[51] In finding that good cause existed to pass over Kolrud for a person with lower priority (David Thomas), the district court noted:

> [U]nder the circumstances of this case [David] Thomas' lack of any actual or potential conflict of interest between his duties as guardian and conservator and any financial interest in Lucille's estate assets is virtually zero. On the other hand, Kolrud's circumstances in becoming a friend of Lucille at the time he was in the process of advising her and then selling her annuities and making commissions and being named as beneficiary of such annuities and other assets and having a very significant financial interest in Lucille's assets as a result of that fiduciary relationship

> poses a potential built-in conflict of interest in his acting as guardian and conservator for Lucille under all the circumstances presented to the Court and the various conflicting desires expressed by Lucille regarding the size and extent of her estate and how she wishes it to be ultimately handled…." *Id.* at ¶ 10.

This case is distinguishable from *Thomas* because K.P. has never had a fiduciary relationship with R.G.; has not financially benefited from R.G.; and under R.G.'s Last Will and Testament, K.P. only stands to inherit from R.G. if S.P. does not survive him. K.P. has not benefitted from his relationship with R.G. in any way.

[52] With regard to a potential conflict of interest with S.P., at the time of the Guardianship Hearing an emergency guardianship and conservatorship was already in place, and K.P. was not the appointed person serving in those capacities. As such, he was not in a position to, nor did he have an obligation to, pursue rescission of transactions from R.G. to S.P. This certainly did not mean that he would have been unwilling or unable to do so. In fact, K.P. did testify that he felt he could work with his sister if any of the transfers had been improper.

[53] North Dakota law does not address what constitutes good cause or a legally sufficient reason. The Maryland Court of Special Appeals has addressed the issue in the context of negligence and their treatment of legal sufficiency is instructive as to a proper meaning in the instant context. According to the Maryland Court,

> " 'Legally sufficient' means 'that a party who has the burden of proving another party guilty of negligence, cannot sustain this burden by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture that such other party has been guilty of negligence, but such evidence must be of legal probative force and evidential value.' "

Malik v. Tommy's Auto Serv., Inc., 24 A.3d 114, 119 (Md. Ct. Spec. App. 2011)

[54] As to the instant case, a finding of good cause to pass over a nominated guardian for a person of lower priority should require more than "a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture" that good cause might exist, and such evidence should be of legal probative force and evidential value.

[55] In the case of *In re Guardianship of B.K.J.*, this Court found that "[t]he district court shall appoint the incapacitated person's most recent nomination for a durable power of attorney as the person's guardian, '[u]nless lack of qualification or other good cause dictates the contrary." *In re Guardianship of B.K.J.*, 2015 N.D. 191, at ¶ 6 (citing N.D.C.C. § 30.1-28-11(1)). In *B.K.J.*, the incapacitated person did not have a valid power of attorney in place at the time of the hearing. The parties had stipulated that B.K.J. was incapacitated and B.K.J. subsequently nominated two of her friends to be co-guardians and co-conservators. The district court found that good cause existed to appoint J.W., a person with lower priority, as a co-guardian instead of the persons nominated by B.K.J.

[56] This Court noted that when N.D.C.C. § 30.1-28-11(2) does not apply, the order of priority a district court must consider for appointing a guardian is found in N.D.C.C. § 30.1-28-11(3). In terms of who has highest priority when no valid power of attorney exists, subsection (2)(a) of section 30.1-28-11 states that "[a] person nominated by the incapacitated person *prior to being determined to be incapacitated*, when nominated by means other than provided in subsection 2 ... if in the opinion of the court, acted with or has sufficient mental capacity to make an intelligent choice." N.D.C.C. § 30.1-28-11(2)(a).

[57] This case is distinguishable from *B.K.J.* because R.G. had not been declared to be an incapacitated person prior to his execution of the DPOA. R.G. executed the DPOA on

July 2, 2014. The Emergency Petition was not filed until September 26, 2014. For this reason, N.D.C.C. § 30.1-28-11(2) applies to this case.

[58] S.P. was nominated as R.G.'s attorney-in-fact under the July 2nd, 2014 DPOA. However, she agreed to waive her right to appointment. This meant that K.P. had priority to be appointed as R.G.'s attorney in fact, as the DPOA named him as the alternate attorney-in-fact if S.P. was unable or unwilling to serve in that capacity. Under the DPOA, R.G.'s attorney-in-fact was authorized to nominate a person (including R.G.'s attorney-in-fact) or entity to be appointed as guardian and/or conservator.

[59] During the Guardianship Hearing K.P. requested that he be appointed R.G.'s guardian and conservator. Tr. 35:1-8. Pursuant to N.D.C.C. 30.1-28-11(2), K.P. had priority to be appointed as guardian and conservator because, as R.G.'s attorney in fact under the DPOA, he could and did nominate himself as guardian and conservator. As such, K.P. should have been appointed as guardian and conservator unless it could be shown that he was unqualified to serve, or that good cause existed to appoint a person with lower priority.

[60] The mere appearance of a conflict of interest alone is not a legally sufficient reason to pass over a duly nominated person as guardian and conservator. To hold to the contrary would allow a person of lower priority to skirt an incapacitated person's wishes by overcoming an impermissibly low burden. Furthermore, as R.G.'s DPOA was executed prior to any determination of his capacity, no good cause existed to appoint S.S., K.N., G.A.P.S. as co-guardians, nor American State Bank as conservator. As such, the district court committed reversible error in finding that good cause existed to appoint persons with lower priority as guardians and conservator.

B. Lack of Qualification

[61] Section 30.1-28-11(1) of the North Dakota Century Code sets forth the qualifications for who may serve as a guardian. That section states that "[a]ny competent person or a designated person from a suitable institution, agency, or nonprofit group home may be appointed guardian of an incapacitated person." N.D.C.C. § 30.1-28-11(1).

[62] K.P. is R.G.'s nephew. He is a faculty member at Virginia Tech University in Blacksburg, Virginia. Tr. 28:6-7. He "owned a number of businesses concurrently for a period of 15-16 years." Tr. 35:13-14. K.P. stated that he handled payrolls, managed multiple bank accounts, and paid bills for these businesses. Tr. at 35:14-17. K.P. cared for his mother and younger brother after his father died. Tr. at 35:20-22. K.P. is a competent person who is qualified under the statute.

[63] The trial judge did not make any findings of fact as to whether K.P. was unqualified to serve as guardian or conservator. The attorney for the Petitioner stated that she believed he was unqualified because "he resides in Virginia." Tr. 49:20; 50:8-9. This fact alone, even if it had been noted as a factual finding, is insufficient to show lack of qualification. "Qualification" pursuant to section 30.1-28-11(1) simply requires the appointed person to be competent. The statute does not require the appointed person to live near the incapacitated person; nor does it require a degree of education, experience or contact with the incapacitated person.

[64] In the case of *In re Guardianship of Thomas* this Court upheld a district court's decision to appoint a person with lower priority as guardian. The court did this even though the person with the higher priority lived in the same town as the ward and the appointed guardian lived 400 miles away. The person nominated by the ward was a

friend who had assisted the ward in financial planning matters and received commissions for doing so. The person nominated by the court was a nephew who lived some 400 miles away from the ward and visited her about once per year. This appointment was made over a person who had priority.

[65] In finding that the ward's nephew was better suited to serve as guardian, the court noted that the nephew "had no ownership or beneficiary interest, and would not accept any, in [the ward's] assets, and had said he would waive his right to compensation if appointed." *Thomas*, at 388. The guardian nominated by the ward "was willing to waive his right to compensation as guardian and conservator, but was not willing to waive his right to take under the estate." *Id.*

[66] Like the potential guardians in *Thomas,* K.P. testified that he would not seek compensation for his services. Tr. 36:12-14. K.P. also testified that he believed he would be able to work with his sister to resolve issues pertaining to the transfers of property from R.G. to S.P. Tr. 37:10-16. In fact, it may have been in R.G.'s best interests to have K.P. deal with S.P. regarding the transfers, as pursuing rescission of those transfers via litigation would likely cost R.G. considerably. There was no testimony or evidence taken regarding whether K.P. had a beneficiary interest in K.P.'s estate, or if he would disclaim any potential interest.

[67] Because K.P. was qualified under the statute, and no good cause was shown, the district court erred as a matter of law in passing over K.P. to nominate S.S., K.N., G.A.P.S. and American State Bank as co-guardians and conservator.

Conclusion

[68] For the reasons stated above, K.P. has priority to serve as guardian and conservator for R.G. The district court erred as a matter of law by failing to make findings of fact and conclusions of law. The district court abused its discretion by appointing S.S., K.N., GAPS and American State Bank as co-guardians and conservator.

Respectfully submitted this 20th day of November, 2015.

LARSON LATHAM HUETTL LLP
Attorneys for Appellant
521 East Main Ave., Suite 450
P.O. Box 2056
Bismarck, ND 58502-2056
Phone: (701) 223-5300
Fax: (701) 223-5366
Email: wblack@bismarcklaw.com

/s/ William C. Black
By: William C. Black (ID 07284)

CERTIFICATE OF COMPLIANCE

[69] The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(7)(A), that the *Brief of Appellant* was prepared with Times New Roman proportional typeface, 12 pt. font, and the total number of words in the above Brief, including footnotes, but excluding words in the cover page, table of contents, table of authorities, jurisdictional statement, statement of the issues, signature block, certificate of service and this certificate of compliance, totals 5,942 words.

Dated November 20, 2015.

LARSON LATHAM HUETTL LLP
Attorneys for Appellant
521 East Main Ave., Suite 450
P.O. Box 2056
Bismarck, ND 58502-2056
Phone: (701) 223-5300
Fax: (701) 223-5366
Email: wblack@bismarcklaw.com

/s/ William C. Black

By: William C. Black (ID 07284)